

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

Herring Broadcasting Inc., d/b/a WealthTV,

Complainant,

v.

Bright House Networks, LLC

Defendant

MB Docket No. 08-214
File No. CSR-7822-P

To: Chief, Media Bureau

**OPPOSITION OF BRIGHT HOUSE NETWORKS, LLC TO HERRING
BROADCASTING, INC.'S MOTION FOR REVOCATION
OF HEARING DESIGNATION ORDER**

Bright House Networks, LLC ("Bright House") hereby opposes the Motion for Revocation of Hearing Designation ("Revocation Motion") filed in this proceeding by Herring Broadcasting, Inc. ("WealthTV"). Without supplying any justification other than dissatisfaction with the schedule established by the Administrative Law Judge in this case¹, the Revocation Motion invites the Bureau to run roughshod over the ALJ's plenary jurisdiction over this matter and reverse itself on the substantive question of whether disputed issues of material fact exist that preclude granting WealthTV the relief it seeks without a hearing. The Bureau should deny WealthTV's Revocation Motion and reject WealthTV's invitation to act in such a flagrantly arbitrary and capricious manner.

¹ *Memorandum Opinion and Order*, FCC 08M-47, MB Docket 08-214, released November 20, 2008 ("November 20 Order") (announcing the impossibility of meeting the 60-day timetable discussed in the HDO) and *Procedural and Hearing Order*, FCC 08M-50, MB Docket 08-214 (rel. December 2, 2008) (setting a March 17, 2009 trial date and other dates for pretrial activities).

ARGUMENT

I. WealthTV has Offered No Substantive Justification for the Bureau to Reverse Itself and Find that WealthTV is Entitled to Program Carriage Relief as a Matter of Law

At WealthTV's urging², the Bureau issued a Hearing Designation Order in this case. The Bureau stated: "After reviewing the pleadings and supporting documentation filed by the parties . . . we also find that [they] present several factual disputes as to whether . . . [Bright House] . . . discriminated against WealthTV in favor of their affiliated MOJO service."³ Contrary to WealthTV's mischaracterization⁴ of the Commission's *Second Report and Order* implementing Sections 12 and 19 of the 1992 Cable Act,⁵ in situations like the present one, the Commission has committed itself to the resolution of factual disputes relating to carriage agreements in a hearing before an ALJ, not by the Bureau: "Rather, we anticipate that resolution of most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations. In such cases, after reviewing the complaint, answer and reply, staff will inform the parties of its determination that resolution of the complaint will require a hearing before an Administrative Law Judge ("ALJ").⁶ Having the Bureau resolve such disputed factual issues was not an option discussed, much less authorized, in the *Second*

² See, e.g., "Carriage Agreement Complaint" of Herring Broadcasting, Inc. (March 13, 2008) Prayer for Relief at (d): "Order the expedited handling of this complaint, including prompt referral of this complaint to an Administrative Law Judge ("ALJ") of the Commission, with instructions that the complaint shall be resolved no later than 120 days after the date of the filing of this complaint."

³ *In the Matter of Herring Broadcasting, Inc., d/b/a/ WealthTV, Memorandum Opinion and Hearing Designation Order*, DA 08-2269, rel. October 10, 2008, as modified by *Erratum*, rel. October 15, 2008 at ¶58.

⁴ See Revocation Motion at 3: "Moreover, the Commission's 1993 order adopting the rules governing the carriage access complaint process makes clear that referral to an administrative law judge is not required, and that a complaint may be resolved by the Bureau with responsibility for cable services issues."

⁵ *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, MM Docket 92-265, 9 FCC Rcd 2642, 2652 (1993) ("Second Report and Order").

⁶ *Id.* at ¶34; emphasis added.

Report and Order.⁷ Thus, it is absolutely clear that the existence of disputed issues of fact require resolution in a hearing before an ALJ.

Secondly, there can be no doubt that there are such factual disputes in this case. Not only did the Bureau, in the *Hearing Designation Order* that WealthTV now asks it to revoke, find that such disputes existed; but also WealthTV admitted the existence of such disputes in its own filings with the Bureau. In its "Reply" to Bright House's Answer, WealthTV states:

WealthTV has alleged that the reason that it has been denied carriage . . . is that Bright House has elected to favor MOJO [another program service] over WealthTV because MOJO is affiliated with Bright House. . . . Bright House contests these supported allegations in its answer, thus establishing a material factual dispute that requires an administrative hearing."⁸

Indeed, in that "Reply," WealthTV went to great lengths to establish that all that it was required to do was establish a *prima facie* case, not to prove it:

Of course, WealthTV need not prove its case in the complaint; the rules require only presentation of a *prima facie* case. Bright House's controversion or denial of the allegations in its answer does not overcome WealthTV's *prima facie* case; indeed where the Commission judges WealthTV's allegations adequately supported . . . such denials establish that there are material factual disputes that require resolution by a finder of fact. As the Commission's *1993 Second Report and Order* and its order in *TCR v. Comcast* made clear, the proper procedure once a material dispute of fact has been identified is to refer the case to a finder of fact.⁹

While it may be acceptable for WealthTV to do a complete about-face in its position as to when the Commission's *Second Report and Order* requires a hearing before an ALJ and when it does not, WealthTV has completely failed to give the Bureau a reason why it should follow WealthTV in performing such an arbitrary and capricious maneuver. WealthTV's Revocation Motion points to no new facts that render its previous characterization of the record inoperative

⁷ Paragraph 31 of the *Second Report and Order*, which refers to staff disposition, says that staff will make the initial determination as to whether or not a *prima facie* case exists and may decide "whether it can grant relief on the basis of the existing record." However, nowhere in paragraph 31 (or elsewhere) does the *Second Report and Order* say that staff may resolve disputed issues of fact. See *Second Report and Order* at ¶31. That function is reserved to the ALJ in paragraph 34.

and the Bureau's characterization of the record in the HDO incorrect. Rather, the only "new fact" to which the Revocation Motion alludes is the fact that the ALJ found that he simply could not comply with a 60-day schedule for resolving six cases involving three different program services in a manner that was consistent with the parties' right to procedural due process.¹⁰ However, this fact is a procedural fact; it is not substantive evidence that would be in the case. It can not be, therefore, a basis for the Bureau to reverse itself and withdraw this case from a hearing. In short, WealthTV's request, as a matter of substance, is completely unjustified; and if the Bureau grants it, such an action will be arbitrary and capricious.

II. WealthTV's Revocation Motion is Procedurally Improper.

The Commission's Rules make clear that, once a matter has been referred to an ALJ, the Presiding Judge, not the Bureau, controls the proceeding and its procedure.¹¹ The gist of WealthTV's objection is to the November 20 Order's decision not to resolve these cases within 60 days and, apparently, to the ALJ's subsequent schedule for disposition that provides for a trial to begin on March 17, 2009. The proper vehicle for obtaining review of those decisions – and one that avoids having the Bureau take the extraordinary and unjustified step of reversing its finding in the HDO that there are disputed issues of fact that require a hearing – was to have sought leave from the ALJ to file an interlocutory appeal under Section 1.301(b) of the Commission's Rules. WealthTV did not seek such leave.

Instead and realizing the difficulty of asking the Bureau to intrude upon the jurisdiction of the ALJ, WealthTV seeks to characterize its Revocation Motion as a tardy motion for

⁸ "Complainant's Reply to Answer of Defendant Bright House Networks LLC in Support of its Complaint," filed May 5, 2008 at p. 9; emphasis added.

⁹ *Id.* at p. 9; emphasis added.

¹⁰ November 20 Order at ¶7, page 3: "Under all these circumstances, it is the Presiding Judge's view that it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe contemplated in the HDO."

¹¹ See e.g., *Industrial Business Corp.*, Decision, 47 FCC 2d 891 at ¶ 6 (Rev. Bd. 1974) (ALJ "has plenary authority to regulate the course of the hearing..."); *Selma Television, Inc.*, Memorandum Opinion and Order, 3 FCC 2d 63 (1966).

reconsideration of the HDO, since it was filed more than 30 days after the issuance of the HDO.¹² This effort, too, must fail.

First, even if the Revocation Motion had been timely filed, it would have been procedurally improper because of its substance. The Revocation Motion does not complain of anything in the HDO; rather it complains of an ALJ order issued subsequent to the HDO. By definition, if a party is seeking reconsideration of some order, then its complaint must be about something in the four corners of that order, not about something in some other, subsequent, order.

Secondly, even if the HDO itself had included a timetable for disposition that was not to WealthTV's liking, under the Commission's Rules that would not be proper grounds for reconsideration. Section 1.106(a)(1) provides that petitions for reconsideration of an HDO will lie only if they "relate to an adverse ruling with respect petitioner's participation in the proceeding." In other words, if the HDO excludes a person from being a party to the subsequent proceeding, that party may seek reconsideration. WealthTV tries to bootstrap this narrow permission into a broad authorization to raise other objections to procedure because, assertedly, "it adversely affects such participation by making the litigation open-ended as to time and expense."¹³ If adopted, this would be an exception that swallowed the rule; because every substantive and procedural ruling in an HDO could be so characterized. For example, the holder of a radio license could claim that the issuance of an HDO regarding a petition to deny renewal of that license "adversely affects its participation in the proceeding" because it forces the licensee to endure the time and expense of a hearing in order to get its license renewed.

Finally, the request for a waiver of the 30-day time limit in Section 1.106(f) of the Commission's Rules is absurd.¹⁴ The Revocation Motion attempts to justify this "untimeliness" by asserting that "the timing of the issuance of the November 20 order made compliance with the

¹² Revocation Motion at p. 4.

30 day period of § 1.113 impossible.”¹⁵ The absurdity, of course, is WealthTV’s request that it should be excused from the 30-day deadline for seeking reconsideration of the HDO because it had no way of knowing that it had a problem with the HDO until after the ALJ issued the November 20 Order. This only highlights the fact that the Order that WealthTV complains of is not the HDO at all; it is the ALJ’s November 20 Order.

In short, there are no circumstances, substantive or procedural, under which WealthTV’s Revocation Motion can be considered a petition for reconsideration of the HDO. The Revocation Motion is not about the HDO at all. Rather, WealthTV’s Revocation Motion is an effort to circumvent its procedural obligation to get the ALJ’s permission before seeking review of one of his interlocutory orders – in this case, the November 20 Order indicating that the case will not be resolved in 60 days. Revocation of the HDO is simply the draconian remedy that WealthTV proposes to assuage its dissatisfaction with the ALJ’s calendar for disposition of this case without having to seek his permission for an interlocutory appeal.

CONCLUSION

WealthTV has offered the Bureau no basis for reversing its conclusion that there are disputed issues of fact that require a hearing in this case and revoking the HDO. Moreover, it has chosen a procedurally improper means to take the scheduling of the matters in the hearing out of the hands of the Presiding Judge.¹⁶ It has a remedy for its grievance, but has chosen not to

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* WealthTV’s citation to Section 1.113 is inapposite; that section refers to an action taken on the Commission’s (or the Bureau’s or the ALJ’s) own motion. Section 1.106(f) prescribes the time within which a party must seek reconsideration of an order. Of course, it is oxymoronic for WealthTV or any other party to request the Bureau to act “on its own motion.” By definition, any action taken following such a request to do so, can not be said to be “on its own motion.” Rather, that action is done at the request of a party.

¹⁶ Bright House notes that, at 8:22 p.m. EST on December 3, 2008, WealthTV served the undersigned counsel with a procedurally improper “Supplement” to its Revocation Motion, which contains no new relevant information. Given that it has a right to reply to this “Opposition” there is simply no excuse for WealthTV having filed this unauthorized pleading. The “Supplement,” however, further underscores that WealthTV’s grievance is with the ALJ’s conduct of the case, not with the HDO and either misunderstands or mischaracterizes the reason cited by the ALJ as to why this proceeding can not be resolved in 60 days. The “Supplement” makes the puzzling statement that

use that remedy and, instead, invites the Bureau to disregard the Commission's procedural Rules without good cause, and to reverse itself in designating this matter for a hearing, for no cause at all. For these reasons Bright House Networks, LLC urges the Bureau to deny WealthTV's Motion for Revocation of Hearing Designation.

Respectfully submitted,

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Dated: December 4, 2008

"In these circumstances, WealthTV respectfully suggests that the Media Bureau has greater resources available to apply to prompt and timely resolution of this matter." (Supplement at p. 3) The problem is not the "lack of resources" of the Bureau versus the "resources" of the ALJ. Rather, as the November 20 Order clearly spells out, the problem is the amount of time required for the respondents, including Bright House, to prepare a case in defense: to retain and prepare expert witnesses, to depose the expert witnesses of the complainants, including WealthTV, to obtain relevant documents from the complainants, not to mention conducting a trial of essentially three entirely different cases, involving three complainants and four respondents.

CERTIFICATE OF SERVICE

I, Glenda V. Thompson, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Opposition of Bright House Networks To Herring Broadcasting, Inc.'s Motion For Revocation of Hearing Designation" were served this 4th day of December, 2008, via email, upon the following:

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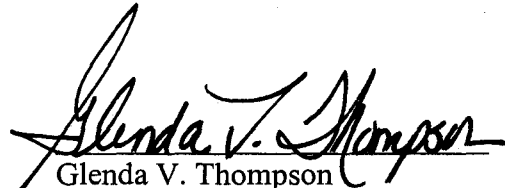
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